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Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Roberta McLaren.
Petitioner,

V.

Imperial Casualty & Indemnity Co.
and Special Risks, Inc.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an on duty uniformed police officer as a matter of law acting outside the course and scope of his employment so as to preclude the common law tort liability of his employer when he sexually assaults in his patrol car a female motorist arrested and placed in custody pursuant to the authority of his office?

2. Can the Court of Appeals in the absence of any authority from the Texas Supreme Court ignore clear authority from Texas' intermediate appellate courts upholding employer vicarious liability for sexual assaults committed by their on duty employees and hold to the contrary consistent with the Rules of Decision Act 28 U.S.C. § 1652 and the teaching of Erie v. Tompkins, 304 U.S. 64 (1938)?

3. Is the failure of the Court of Appeals to apply the clear, long standing rule of Texas common law that an ambiguous insurance contract is to be construed against the insurer in the face of the court's finding as a matter of law that the insurance contract at issue is ambiguous, violative of the Rules of Decision Act 28 U.S.C. § 1652 and the teaching of Erie v. Tompkins, 304 U.S. 64 (1938)?

4. Did the decision of the Court of Appeals deny Petitioner her right to due process of law and to a jury trial guaranteed by the Fifth and Seventh Amendments to the United States Constitution in holding as a matter of law that a sexual assault committed by an on duty uniformed police officer in his patrol car upon a female motorist

arrested and placed in custody by an exercise of the authority of his office, was not in the course and scope of the officer's employment?

5. Did the Court of Appeals err in violation of the teaching in Lehman Brothers v. Schein, 416 US 386 (1974) in not granting Petitioner's request to certify to the Texas Supreme Court the question of whether a sexual assault by an on duty uniformed police officer in his patrol vehicle upon a female motorist placed in custody by authority of his office, was entitled to a jury trial on whether the assault was in the course and scope of the officer's employment, the question having never been addressed by the Texas Supreme Court, but having been answered affirmatively by Texas' intermediate appellate courts?

6. Was the retroactive application of a common law statute of limitations decision to Petitioner's claims of insurance bad faith in violation of the due process clause of the Fifth Amendment to the United States Constitution, and this Court's rules on retroactivity?

7. Does the Court of Appeals' decision deny Petitioner due process and equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution in applying a different standard of vicarious tort liability to sexual assault victims, who are overwhelmingly female, than to victims of non-sexual assaults?

LIST OF PARTIES

All parties to the proceeding before the United States Court of Appeals for the Fifth Circuit appear in the present caption.

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IN THE

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to

review that Court's July 6, 1992 Judgment and Opinion in this proceeding. Petitioner's Motion for Rehearing and Rehearing En Banc was denied on August 21, 1992.

OPINIONS BELOW

The original Opinion for the United States Court of Appeals for the Fifth Circuit, dated April 9, 1992, parts of which are adopted in the Court's subsequent Opinion was not reported and is attached hereto as Exhibit A to this Petition.

The Opinion of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing and Suggestion for Rehearing En Banc on behalf of Respondent Imperial Casualty and Indemnity Company and Special Risks, Inc. and dated July 6, 1992 and from which review is sought was not reported and is attached as Appendix B to this petition.

The Order of the Court of Appeals for the Fifth Circuit denying Petition for Rehearing and Rehearing En Banc is

not reported and attached as Appendix C.

The Opinion of the United States District Court for the Northern District of Texas is reported at 762 F. Supp. 1364 (N.D. Tex. 1991) ans attached as Appendix D.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its order denying Petitioner's Motions or Rehearing and Rehearing En Banc from which review is sought on August 21, 1992. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presented or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

> Militia, when an actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled at any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Seventh Amendment to the United States Constitution

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

Fourteenth Amendment to the United States Constitution Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules of Decision Act, 28 U.S.C. § 1652

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

1. **Course of proceedings and disposition in court below.** Petitioner, Roberta McLaren commenced her suit against Officer Larry Taylor and the City of Bedford, Texas, in the 153rd Judicial District Court of Tarrant County, Texas, charging Taylor with assault, sexual assault, false arrest, false imprisonment, intentional infliction of emotional distress and violation of her rights as guaranteed by the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. (R. 628) McLaren alleged that Taylor was in the course and scope of his employment at the time he attacked her following a routine traffic stop. After a settlement with the City of Bedford on June 26, 1989 at the conclusion of a trial before the

court, judgment was rendered against Taylor who represented himself pro se during the course of litigation and failed to appear at trial. (R. 579) Following the rendition of judgment, McLaren discovered that Taylor was the beneficiary of a liability insurance policy obtained for him by his employer, the City of Bedford, and obtained from him an assignment of his cause of action to proceed against the insurance company who had refused him both a defense and indemnity claiming the policy did not cover the allegations made against Taylor. (R. 970) On May 15th, 1990, McLaren commenced this suit in Texas state court and Defendants removed the action to the District Court for the Northern District of Texas. (R. 10) On February 12, 1991, the District Court

granted motion for summary judgment for all Defendants and McLaren appealed. On April 9, 1992, the panel of the Court of Appeals for the Fifth Circuit rendered a per curiam opinion in part reversing the District Court judgment and rendering judgment in favor of McLaren holding that the insurance contract at issue was ambiguous and, applying well established Texas case law, held that such ambiguity compels Texas courts to find in favor of coverage and against the insurer. (Appendix B) Imperial Casualty & Indemnity Company moved for rehearing en banc as well as for panel rehearing. On July 6, 1992, without affording McLaren the opportunity to respond to the request for panel rehearing, the panel substituted its prior opinion with an opinion once again finding the insurance

contract at issue ambiguous but nevertheless holding against McLaren on all counts. (Appendix A) McLaren's Petition for Panel Rehearing and Rehearing En Banc was denied on August 21, 1992.

2. **Statement of facts.** On the evening of April 22, 1985, Roberta McLaren left the Steak & Ale Restaurant in Hurst, Texas, having had dinner with some of her friends. (R. 988, 1033) On her way home along the busy airport freeway she was stopped by Bedford Police Officer Larry Taylor in uniform and on duty, and having presented him with her drivers license, was asked to perform a field sobriety test. (R. 988, 1033) Having completed the test, but not able to provide proof of liability insurance, Officer Taylor issued her a traffic

citation for having no proof of liability insurance and then instructed her to get into her car and to follow him. (R. 988, 1033) Thinking she was being arrested and taken to jail she complied. (R. 988) A short distance off the freeway and in the area McLaren thought was the police station, she was instructed to enter the police vehicle and at this point, Officer Taylor, with his hand on his firearm, instructed McLaren to partially undress and forced her to perform an oral sex act on him. (R. 988, 1033) Altering the citation he had presented to her, he ordered her to leave. She proceeded to a convenience store where she hysterically summoned police from another jurisdiction and reported the incident. (R. 988. 1033) Prior to the assault on McLaren, Officer Taylor had sexually assaulted three other

women while performing police functions, one a female police officer. His chief was aware of two of the three assaults. (Chief Lightford Deposition, pp. 175-95)

Imperial Casualty & Indemnity Company had issued a Law Enforcement Liability policy to the City of Bedford, Texas, covering police officers who were employed by the City at the time of the incident in question. (R. 656, Appendix C) The policy promised to pay on behalf of the insured all sums to which the insured would become legally obligated to pay as damages because of "wrongful acts arising out of law enforcement activities." (R. 656, Appendix C) Wrongful acts were defined to include acts of an officer "within the scope of his employment or official duties pertaining to the law enforcement

functions of the Insured." (R. 656, Appendix C) Also pertinent was the definition of personal injury which included among other things false arrest, false imprisonment, assault and battery, mental anguish, and deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States of America." (R. 656, Appendix C) The District Court granted summary judgment holding, as a matter of law, that sexual assault by definition was not in the course and scope of employment. 762 F.Supp. at 1369-71.

REASONS FOR GRANTING THE WRIT

I. IN A CASE REMOVED BY DIVERSITY JURISDICTION TO THE FEDERAL COURT, THE COURT OF APPEALS, ON AN IMPORTANT QUESTION OF WHETHER A VICTIM OF SEXUAL ASSAULT IS ENTITLED TO A JURY DETERMINATION OF THE TORT RESPONSIBILITY OF HER ATTACKER'S EMPLOYER, DISREGARDED CLEAR, RECENT DECISIONAL LAW OF TEXAS INTERMEDIATE APPELLATE COURTS UPHOLDING SUCH A RIGHT, AND, HELD AS A MATTER OF LAW THAT NO SUCH RIGHT EXISTS, CONTRARY TO THE RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT; THE RIGHT TO A JURY TRIAL GUARANTEED BY THE SEVENTH AMENDMENT; AND THE RIGHT TO EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; THE RULES OF DECISION ACT 28 U.S.C. § 1652; AND THE TEACHING OF ERIE V. TOMPKINS, 304 US 64 (1938) AND HANNA V. PLUMER, 380 US 460 (1965).

In Meritor Savings Bank v. Vinson, 477 US 57 (1986) this Court granted certiorari to review "important questions concerning claims of workplace 'sexual harassment' . . . " in the context of Title VII, 1964 Civil Rights Act. 477 US at 59. Acknowledging the "debate over

the appropriate standard for employer liability" the court declined on the state of the record to "issue a definitive rule on employer liability", but noted the probable applicability of common law agency principles. 477 US at 72. The holding of the Court of Appeals in this case, on common law agency grounds that, as a matter of law, sexual assault could not be within the course and scope of employment would nullify this Court's holding in Meritor, supra. The unfortunate prevalence of sexual assault by those in positions of authority whether they be police officers or employers has resulted in a number of well reasoned decisions holding that the employers responsibility for the conduct of its employees in this area is one of fact to be determined by a jury. Mary M

v City of Los Angeles, 814 P.2d 1341 (Cal. 1991) (Facts very similar to the case at bar.) Graham v. Saux Prairie Police Commission, 915 F.2d 1085 (7th Cir. 1990); Dias v. Sky Chefs, Inc., 919 F.2d 1370 (9th Cir. 1990). In order to encourage employers to take an active role to eliminate sexual harassment and attacks on behalf of their employees common law principles must permit the assessment of responsibility on those most able to supervise and prevent such activities. Although Texas Supreme Court has not had occasion to rule directly on the question of course and scope as it applies to sexual assault (the Court of Appeals declined to certify this question), two Texas lower courts have held without exception that such cases present a question of fact for the jury.

In Bushell v. Dean, 781 S.W.2d 652, 658-59 (Tex. App.--Austin, 1989, rev'd on other grounds 803 S.W.2d 711 (Tex. 1990)), after reiterating a number of acts of sexual harassment by Bushell toward his co-employee Mary Dean, the court concluded, "the jury could well have concluded that many of the acts which occurred before Dean rejected Bushell were within his authority." 781 S.W.2d at 659. In Nagel Mfg. & Supply Co. v. Ulloa, 812 S.W.2d 78, 81-82 (Tex. App.--Austin, 1991, no writ) a fellow employee was also found by a jury to have engaged in sexual harassment which was defined by the court for the jury as "unwelcome sexual advances, requests for sexual favors, sexual abuse or vulgar language, or other verbal, visual or physical conduct." 812 S.W.2d at 80. The

court upheld an award of damages and punitive damages as being proximately caused by and within the course and scope of employment of the plaintiff's supervisor. 812 S.W.2d at 82. Officer Taylor had sexually harassed and assaulted three other women (two with the direct knowledge of his police chief) prior to his attack on McLaren, and those attacks had gone unpunished. Despite Texas authority holding that such evidence can, in of itself, constitute the implicit authority of one's employer to engage in that type of activity, Country Roads, Inc. v. Witt, 737 S.W.2d 362 (Tex. App.--Houston [14th Dist.] 1987, no writ)), the Court of Appeals disregarded this case law entirely not even attempting to distinguish it, and held as a matter of law that no such

attack can ever be within the course and scope of employment. The Court of Appeals also ignored the long held Texas "dual purpose" doctrine applicable to respondeat superior:

> Conduct may be within the scope of employment, although done in part to serve the purposes of the servant or a third person. The fact that the preponderant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. (emphasis added).

Best Steel Buildings, Inc. v. Harden, 553 S.W.2d 122, 128 (Tex. Civ. App.--Tyler, 1977, writ ref'd n.r.e.); Howard v. American Paper Stock Company, 523 S.W.2d 744, 747 (Tex. Civ. App.--Fort Worth, 1975, writ ref'd and aff'd on other grounds 528 S.W.2d 576 (Tex. 1975)). To allow the Court of Appeals to ignore the obvious, recent lower court decisions (Bushell v. Dean, was actually before the

Supreme Court and reversed only on evidentiary rulings that assisted the Plaintiff) and find, as a matter of law, no such right to have a jury test this question of respondeat superior is to encourage the forum shopping and inequitable administration of the law that the Erie doctrine has sought to avoid. Hanna v. Plumer, 380 US 460, 468 (1965).

The panel opinion is also contrary to this Court's teaching in Meritor Savings, supra. The federal courts have not hesitated to find respondeat superior under Texas law with regard to assaultive conduct not aimed at women. Wallsteen v. Int'l Bank of Commerce, 770 F.Supp. 1164 (S.D. Tex. 1991); Sauls v. Union Oil Co. of Cal., 750 F.Supp. 783 (E.D. Tex. 1990). The finding, as a matter of law,

that sexual assault, as opposed to other types of assault, can never be within the course and scope of an employee's employment works particularly invidious discrimination upon those who are the targets of these attacks. See Davis v. Passman, 442 U.S. 228 (1979).

II. HAVING TWICE DETERMINED THAT THE INSURANCE CONTRACT AT ISSUE WAS AMBIGUOUS, THE COURT OF APPEALS DISREGARDED CLEAR, UNEQUIVOCAL AND UNANIMOUS TEXAS SUPREME COURT DECISIONS REQUIRING AMBIGUOUS INSURANCE CONTRACTS BE CONSTRUED AGAINST THE INSURER AND HELD THAT THE AMBIGUOUS INSURANCE CONTRACTS BE CONSTRUED IN FAVOR OF THE INSURER, A DETERMINATION CONTRARY TO THE RULES OF DECISION ACT 28 U.S.C. § 1652; AND THE TEACHING OF ERIE V. TOMPKINS, 304 US 64 (1938) AND HANNA V. PLUMER, 380 US 460 (1965).

In both opinions by the panel of the Fifth Circuit, the Court decided that the language of the insurance policy at issue is ambiguous [Opinion of April 9, 1992 pp. 9 and 10 (Appendix A); Opinion of

July 6, 1992, pp. 5 and 6 (Appendix B)]. In its opinion on rehearing the Court of Appeals stated "therefore despite the existence of ambiguities in the policy's wording, we cannot automatically construe that policy against the insurer when, as here, we find the ambiguous wording does have a defined meaning in law." This is undeniably an incorrect statement of Texas law. The case cited by the panel, Security Mutual Casualty Co. v. Johnson, 584 S.W.2d 703, 704 (Tex. 1979) as authority for that statement is a case where the insurance contract was held to be unambiguous ("the majority finds the term unambiguous . . . " 584 S.W.2d at 704). The Texas special rules of construction are applicable to ambiguous insurance contracts and should have been applied to this case. These rules of

construction have been applied in favor of coverage and against the insurer in every case where the court determines that the insurance contract at issue is ambiguous despite the fact that the terms themselves may have clearly defined meanings. Balderama v. Western Cas. Life Ins. Co., 825 S.W.2d 432 (Tex. 1991); Barnett v. Aetna Life Ins. Co., 723 S.W.2d 663 (Tex. 1987), ("As pointed out by Aetna, however, if the insurance contract is expressed in plain and unambiguous language a court cannot resort to the various rules of construction . . . . Although we agree that the language used is definite, the meaning and scope of the language is ambiguous. It has long been the law in this state that when language in a policy is susceptible to more than one

reasonable construction, it is patently ambiguous . . . . We must resort to rules of construction. . ." 723 S.W.2d at 665, 666); Glover v. National Ins. Underwriters, 545 S.W.2d 755 (Tex. 1977) (" . . . we must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not itself unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent . . ." 545 S.W.2d at 761); Ramsay v. Maryland General Ins. Co., 533 S.W.2d 344 (Tex. 1976) ("We have concluded that both parties have offered reasonable, although conflicting, interpretations of the meaning of "commercial automobile" as applied to the facts and circumstances of this case . . . . When the language of a

policy is susceptible of more than one reasonable construction, the courts will apply the construction which favors the insured and permit recovery . . .," 533 S.W.2d at 349); Kelly Associates v. Aetna Cas. & Sur. Co., 681 S.W.2d 593, 596 (Tex. 1984). As recently as 1990, the Fifth Circuit in National Union Fire Ins. Co. v. Kasler Corp., 906 F.2d 196 (5th Cir. 1990) held

> Further where a policy is susceptible to more than one reasonable interpretation, "Texas courts apply the construction which favors the insured and permits recovery . . ." Trammell Crow, 854 F.2d at 99 (citing Ramsay, 533 S.W.2d at 349); accord Glover v. National Ins. Underwriters, 45 S.W.2d 755, 761 (Tex. 1977).
>
> Significantly, "[T]hese special rules favoring the insured are only applicable where there is an ambiguity in the policy; . . . 906 F.2d at 198.

The panel however, in its motion for

rehearing ignores the special rules of construction and in so doing defiantly refuses to follow the teaching of Erie v. Tompkins, supra, and Hanna v. Plumer, supra. There would appear to be no clearer illustration of the egregious departure by a lower court from its clear duty to interpret and apply the Erie doctrine so as to call for an exercise of this court's power of supervision.

III. THE COURT OF APPEALS' FAILURE TO DEFER TO THE TEXAS SUPREME COURT BY CERTIFICATION OF THE QUESTION OF COURSE AND SCOPE, INTERPRETATION OF AN AMBIGUOUS INSURANCE CONTRACT, DUTY TO DEFEND, AND STATUTE OF LIMITATIONS IS VIOLATIVE OF TEACHING OF LEHMAN BROTHERS V. SCHEIN, 416 US 386 (1974).

In Lehman Brothers v. Schein, 416 US 386 (1974) this court held that "it would seem particularly appropriate in view of the novelty of the question and the great unsettlement . . . " of the law of a

sister state that the federal court should take advantage of that state's certification procedure to certify an unsettled question to the state supreme court for a determination. 416 US at 391. Roberta McLaren asked the Court of Appeals to do just that following its sudden and unexpected reversal of its original opinion. The Court has never ruled on McLaren's motion. The Petitioner requests that the Court on the same considerations expressed in Lehman remand this matter for a determination on whether or not certification to the Texas Supreme Court would be advisable in light of lower court opinions clearly granting the right of jury trial on the question of course and scope and sexual harassment and assault cases. At a time when issues of sexual harassment in the

workplace and unfortunately by persons in authority such as police officers (See dissenting opinion, Mary M v. City of Los Angeles, 266 Cal. Rptr. 487 (Cal. Ct. App. 1988)) are receiving much deserved attention deference to the state Supreme Court to allow it to formulate and develop its common law would be the proper course for novel and unique questions such as that at bar.

IV. THE COURT OF APPEALS APPLICATION OF TEXAS SUPREME COURTS' DECISIONAL LAW CHANGING THE STATUTE OF LIMITATIONS IN INSURANCE BAD FAITH CASES OPERATES TO DENY PETITIONER DUE PROCESS OF LAW.

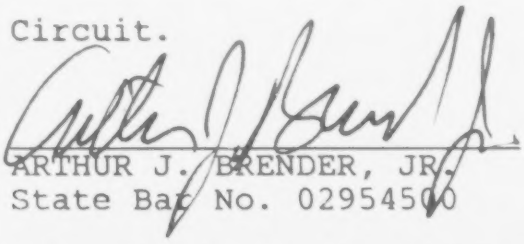
At the time of the accrual of this action, the Texas Supreme Court had held in Arnold v. Nat'l Co. Mut. Fire Ins. Co., 725 S.W.2d 165, 168 (Tex. 1987) held that in actions for bad faith filed against an insurance company the applicable two-year statute of

limitations (Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a)) did not begin to run until the underlying cause of action is concluded. 725 S.W.2d at 168. Judgment was rendered against Officer Taylor, June 26, 1989. (R. 579) Suit was commenced against Imperial Casualty & Indemnity Co. on May 15, 1990 (R. 10), clearly within the two-year statute of limitations. In Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826 (Tex. 1990), decided April 18, 1990, the Texas Supreme Court reversed Arnold and held such causes of action commenced on the date of denial of insurance benefits, an event that occurred prior to McLaren filing her original lawsuit. The Court of Appeals applied Murray retroactively eliminating McLaren's bad faith actions. Retroactive application of such judicial change via

case law which works an "injustice or hardship" is violative of this Court's rules on retroactivity. Cipriano v. Houma, 395 US 701 (1969); James B. Beam Distilling Company v. Georgia, 115 L.Ed.2d 481 (1991).

CONCLUSION

For the foregoing reasons, the Petitioner prays that writ of certiorari issue to review the July 6, 1992 judgment and opinion of the Court of Appeals for the Fifth Circuit.



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